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*In The*  
***Supreme Court of the United States***  
October Term, 1993

**ROBERT L. DAVIS,**  
*Petitioner,*

vs.

**UNITED STATES OF AMERICA,**  
*Respondent.*

**ON WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF MILITARY APPEALS**

**BRIEF  
AMICI CURIAE  
OF  
AMERICANS FOR  
EFFECTIVE LAW ENFORCEMENT, INC.,  
JOINED BY  
THE INTERNATIONAL ASSOCIATION OF  
CHIEFS OF POLICE, INC.,  
THE NATIONAL DISTRICT  
ATTORNEYS ASSOCIATION, INC., AND THE  
NATIONAL SHERIFFS' ASSOCIATION,  
IN SUPPORT OF THE RESPONDENT.**

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This Brief is filed pursuant to Rule 37 of the United States Supreme Court. Consent to file has been granted by respective Counsel for the Petitioner and Respondent. The letters of consent have been filed with the Clerk of this Court, as required by the Rules.



## INTEREST OF AMICI CURIAE

**Americans for Effective Law Enforcement, Inc. (AELE)**, as a national not-for-profit citizens organization, is interested in establishing a body of law making the police effort more effective, in a constitutional manner. It seeks to improve the operation of the police function to protect our citizens in their life, liberties, and property, within the framework of the various State and Federal Constitutions.

**AELE** has previously appeared as *amicus curiae* over eighty-five times in the Supreme Court of the United States and over thirty-five times in other courts, including the Federal District Courts, the Circuit Courts of Appeal and various state courts, such as the Supreme Courts of California, Illinois, Ohio, and Missouri.

**The International Association of Chiefs of Police, Inc. (IACP)**, is the largest organization of police executives and line officers in the world, consisting of more than 14,000 members in 72 nations. Through its programs of training, publications, legislative reform, and *amicus curiae* advocacy, it seeks to make the delivery of vital police services more effective, while at the same time protecting the rights of all our citizens.

**The National District Attorneys Association, Inc. (NDAA)**, is a nonprofit corporation and the sole national organization representing local prosecuting attorneys in America. Since its founding in 1950, NDAA's programs of education, training, publication, and *amicus curiae* activity have carried out its guiding purpose of reforming the criminal justice system for the benefit of all of our citizens.

**The National Sheriffs' Association (NSA)**, is the largest organization of sheriffs and jail administrators in America,

consisting of over 40,000 members. It conducts programs of training, publications, and related educational efforts to raise the standard of professionalism among the Nation's sheriffs and jail administrators. While it is interested in the effective administration of justice in America, it strives to achieve this while respecting the rights guaranteed to all under the Constitution.

*Amici* are national professional associations representing the interests of law enforcement agencies at the state and local levels. Our members include: (1) law enforcement officers and law enforcement administrators who are charged with the responsibility of conducting interrogations within the bounds of the law, and (2) prosecutors and police legal advisors who, in their criminal jurisdiction capacity, are called upon to advise law enforcement officers and administrators in connection with such matters and to prosecute cases involving evidence obtained thereby.

Because of the relationship with our members, and the composition of our membership and directors—including active law enforcement administrators and counsel—we possess direct knowledge of the impact of the ruling of the court below, and we wish to impart that knowledge to this Court.

## ARGUMENT

WHEN A SUSPECT MAKES AN AMBIGUOUS COMMENT REGARDING COUNSEL DURING A CUSTODIAL INTERROGATION, LAW ENFORCEMENT OFFICERS SHOULD BE PERMITTED TO ASK QUESTIONS FOR THE PURPOSE OF CLARIFYING THE SUSPECT'S WISHES.

After the defendant in this case was advised of his *Miranda* rights while in custody, he stated, "Maybe I should talk to a lawyer." He was asked to clarify his statement and he said, "No, I don't want a lawyer." His interrogators then took a break to let him consider his situation and, following the break, resumed interrogation after an abbreviated reminder of his rights, whereupon defendant made incriminating admissions. The court below ruled that defendant's ambiguous statement, "Maybe I should talk to a lawyer," was not a *Miranda* invocation of the right to counsel and the interrogators were entitled to clarify the defendant's statement. "[B]ecause this comment by appellant did not unequivocally invoke his right to counsel, the NIS agents properly conducted further limited questioning to clarify appellant's ambiguous comment." *United States v. Davis*, 36 M.J. 337, 341 (CMA 1993).

Certiorari was granted by this Court to determine the question: "[W]hen a suspect makes an ambiguous request for counsel during a custodial interrogation, must the interrogator cease questioning until the suspect is provided with counsel?"

The defendant's argument in this case is essentially that whenever a suspect makes a reference to counsel—ambiguous or not—the only option open to the police is to provide him with an attorney before saying anything further

to him. That position has been rejected by the majority of the courts that have considered the issue of what the police are to do in the face of an ambiguous reference to counsel. In the context represented by this case, law enforcement officers must cease further interrogation, but they are allowed to ask the suspect questions specifically limited to clarifying his or her desire with respect to counsel. *See e.g.*, *United States v. March*, 999 F.2d 456 (10th Cir. 1993); *United States v. Mendoza-Cecelia*, 963 F.2d 1467, 1472 (11th Cir.), *cert. denied*, 113 S. Ct. 436 (1992); *Parker v. Singletary*, 974 F.2d 1562 (11th Cir. 1992); *Poyner v. Murray*, 964 F.2d 1404 (4th Cir. 1992); *United States v. Eaton*, 890 F.2d 511 (1st Cir. 1989); *United States v. Gotay*, 844 F.2d 971, 975 (2nd Cir. 1988); *Terry v. LeFevre*, 862 F.2d 409 (2nd Cir. 1988); *United States v. Fouche*, 776 F.2d 1398, 1405 (1985), appeal after remand, 833 F.2d 1284, 1287 (9th Cir. 1987), *cert denied*, 486 U.S. 1017 (1988); *United States v. McKinney*, 758 F.2d 1036 (5th Cir. 1985); *United States v. Porter*, 776 F.2d 370 (1st Cir. 1985) (en banc); *Nash v. Estelle*, 597 F.2d 513, 517 (5th Cir. 1979). *Contra*, *Maglio v. Jago*, 580 F.2d 202 (6th Cir. 1978).

The approach of the U. S. Court of Military Appeals, and most other courts as well, is a common sense resolution of the problem. It fully accommodates the rights of the subject, while at the same time preserves the interests of law enforcement and of the public welfare.

Under this rule, law enforcement officers are precluded from badgering suspects who have made an ambiguous statement; the questions after that point are strictly limited to clarifying the suspect's desires (not those of the police) on the issue of access to counsel. Only if the suspect makes it clear that he does not want counsel are the police permitted to continue an interrogation. The suspect's *Miranda* rights

are thus scrupulously protected. At the same time, the police may make a reasonable inquiry (essentially a "ministerial" inquiry as the *March* court, *supra*, called it) in order to ascertain the wishes of the suspect. **It should also be noted that while some arrests are followed by a flat refusal to answer an officer's questions and others produce an unequivocal waiver of rights, it is not uncommon for a bilateral dialogue to ensue, while a suspect considers his *Miranda* rights and options. *Amici* believe that a reversal in this case would adversely impair a very large number of otherwise admissible confessions.**

*Amici* submit that, in effect, what the defendant wants this Court to do is to create an absolute bar to clarification statements. This Court answered that attempt, although in the context of the Fifth Amendment privilege against self-incrimination, in *Michigan v. Mosley*, 423 U.S. 96, 102 (1975). It pointed out that a "blanket prohibition against the taking of voluntary statements or a permanent immunity from further interrogation, regardless of the circumstances, would transform the *Miranda* safeguards into wholly irrational obstacles to legitimate police activity, and deprive suspects of an opportunity to make informed and intelligent assessments of their interests."

We respectfully ask this Court not to unnecessarily adopt a rule that would add to the existing manifold protections presently enjoyed by criminal suspects, while measurably decreasing the ability of beleaguered law enforcement agencies to solve crimes.

## CONCLUSION

*Amici* urge this Court to affirm the decision of the court below on the basis of the precedents of this Court and sound judicial policy; in the alternative, we submit that any error at the trial level was harmless beyond a reasonable doubt.

Respectfully submitted,

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